Petition

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No. A-284.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1981.

FRANCIS THORPE,
PETITIONER,

v.

THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Questions Presented for Review.

I. Whether Petitioners reasonable expectation of privacy in not having his private conversations recorded, transmitted, and disclosed as guaranteed by the Fourth Amendment were violated by the interception of a conversation when the other party but not the petitioner consented to the interception.

II. Whether the interception violated 18 U.S.C. § 2518(1)(C) when normal investigative procedures were not tried prior to the use of electronic interception.

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FRANCIS THORPE,
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THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts, entered in this case on August 5, 1981.

Opinions Below.

The memorandum of decision of the Superior Court Department of the Trial Court for the County of Middlesex, Commonwealth of Massachusetts (filed June 23, 1980) has not been officially published. A copy of that memorandum of decision is annexed hereto as Appendix B (A25-A39).

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (filed August 5, 1981) has been officially published in the Massachusetts Advance Sheet Opinions at Mass. Adv. Sh. (1981) 1827. A copy of that opinion is annexed hereto as Appendix A (A1-A24).

Jurisdiction of the Supreme Court.

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts was made and entered on August 5, 1981. A copy of that judgment is annexed hereto as Appendix C (A40).

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(3).

Constitutional Provisions and Statutes Invoked.

U.S. CONST. AMEND. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. AMEND. XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or prop-

erty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or eman-

cipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

18 U.S.C. § 2510 ET SEQ:

The text of which is annexed hereto as Appendix D (A41).

MASSACHUSETTS GENERAL LAWS, C. 272, § 99:

The text of which is annexed hereto as Appendix E (A42).

Statement of the Case.

The Petitioner, FRANCIS THORPE, was indicted in Middlesex County of the Commonwealth of Massachusetts in February, 1979. He was charged with violating Massachusetts General Laws c. 268, § 2(A)(2) which prohibits corruptly offering something of value to a municipal employee.

He filed a Motion to Suppress in the Superior Court (A25) which was heard by Hallissey, J. After an evidentiary hearing the motion was denied by the Judge and he issued written findings of facts (A26-A33). That denial was appealed to the Supreme Judicial Court which upheld the denial of the Motion by the Trial Court Justice (A40).

The facts pertinent to the Motion to Suppress are briefly stated as follows:

On October 6, 1978 David McCue, an officer in the Wilmington Police force told his Town Manager that he had been contacted by Frank Thorpe, a retired Metropolitan District Commission Policeman who had told him that he could put

McCue in touch with someone who had a copy of an upcoming Sergeant's exam which McCue could purchase.

The Town Manager contacted the Massachusetts State Police. After several meetings between McCue, the Town Manager, the State Police and representatives of the Attorney General's Office, Officer McCue was outfitted with an electronic recording and transmitting device, known as a "Kel-Kit." No alternative investigative techniques were attempted or examined prior to the use of the Kel-Kit. No warrant was sought for the use of the Kel-Kit.

McCue recorded seven conversations which he had with the Petitioner over the period of a month. All of the interceptions were made after instructions from the State Police and within their complete control.

Reasons for Granting Writ.

The writ of certiorari should issue for the following reasons:

I. PETITIONER'S REASONABLE EXPECTATION OF PRIVACY IN NOT HAVING HIS PRIVATE CONVERSATIONS RECORDED, TRANSMITTED AND DISCLOSED AS GUARANTEED BY THE FOURTH AMENDMENT WERE VIOLATED BY THE INTERCEPTION OF CONVERSATIONS WHEN THE OTHER PARTY BUT NOT THE PETITIONER CONSENTED TO THE INTERCEPTION.

The Petitioner in its brief before the Supreme Judicial Court asked that Court to reconsider the holding in *United States v. White*, 401 U.S. 745 (1971) that an interception made with the consent of one party is not a search (A43).

The instant case presents an extreme example of the artificiality inherent in the proposition that no citizen can rea-

sonably expect his conversations to remain confidential. Here what were deliberately intended to be private conversations were transmitted through the airways and recorded. Justice Hufstedler in her dissent in *Holmes v. Burr*, 486 F. 2d 55 (9th Cir. 1973), *cert. denied*, 414 U.S. 1116 (1973) eloquently set out the evils of one party consent interceptions at 486 F. 2d at 66.

> "The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. In terms of the individual's reluctance to speak freely no qualitative difference exists between the danger posed by third party interception and the risk that his auditor has sanctioned a secret recording of their conversation. Extensive police-instigated and clandestine participant recordings, coupled with their use as evidence of any self-incriminating remarks of the speaker, pose 'a grave danger of chilling all private, free, and unconstrained communication. . . . In a free society, people ought not to have to watch their every word so carefully.'" *Lopez v. United States, supra* note 12, 373 U.S. at 452, 83 S. Ct. at 1395 (Brennan, J., dissenting).

The ten years since the decision in *United States v. White*, 401 U.S. 745 (1971) have seen a steady increase in electronic monitoring capabilities. This court should reconsider whether the constitutional ban on unreasonable searches and seizures must be interpreted to prohibit the type of intrusive technology used in this case.

The reasonable expectation of privacy discussed in *Katz v. United States*, 389 U.S. 347 (1967) at p. 353 must include the expectation that private conversations will not be transmitted and recorded without knowledge of a participant.

II. The Interception Violated 18 U.S.C. § 2518(1)(C) when Normal Investigative Procedures Were Not Tried Prior to the Interception.

The States are authorized to permit interceptions of oral communications under 18 U.S.C. § 2516(2) if the interception is "in conformity with sec. 2518 of this chapter." Section 2518 requires in part that electronic surveillance may be authorized only if the court finds that "normal investigative procedures have been tried and failed or reasonably appear to be too dangerous" 18 U.S.C. § 2518(3)(C).

The Massachusetts wiretap statute also requires exhaustion of normal investigative techniques in G.L. c. 272, § 99(E) which holds, in part, that

> A warrant may issue only: . . . 3 [u]pon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

The detailed findings of fact by the trial judge (A26-A33) make it clear that no alternative techniques were investigated prior to the use of the "Kel-Kit" device.

This type of immediate recourse to electronic surveillance is precisely the type of activity which was to be prevented by 18 U.S.C. § 2518(3)(C).

The Petitioner was not afforded the minimum protection of the Federal wiretap statute. The Motion to Suppress should have been granted.

Conclusion.

For the reasons set forth above the Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH.

MIDDLESEX COUNTY.

No. M-2320.

COMMONWEALTH,
APPELLEE,

v.

FRANCIS THORPE,
APPELLANT.

Application of the Appellant for for Further Appellate Review.

HENNESSEY, C.J. This case involves the construction of the Massachusetts communications interception statute, G.L. c. 272, § 99, as appearing in St. 1968, c. 738, § 1. Prior to trial in the Superior Court on the charge of corrupting a municipal officer under G.L. c. 268A, § 2(*a*)(2), the defendant Francis Thorpe moved, pursuant to G.L. c. 272, § 99P, to suppress certain tape recordings of conversations between himself and the Commonwealth's chief witness. After a hearing, the judge denied the motion. Thorpe sought and was granted leave to file an interlocutory appeal. See Mass. R. Crim. P. 15(b)(2), 378 Mass. (1979). We affirm the denial of the motion to suppress.

We summarize the background as set forth in the judge's memorandum of decision. The Commonwealth expects to prove at trial that Thorpe, a former police officer retired on disability, offered to sell a copy of a police sergeant's promotional examination to David McCue, a Wilmington police officer planning to take the October 21, 1978, examination.

On October 6, 1978, Thorpe telephoned McCue, who recognized Thorpe's voice. Thorpe ascertained that McCue was studying for the sergeant's examination and said that the examination was available to Thorpe through an organization headed by a woman. He offered to sell McCue the examination for $4,000 and said he would meet McCue on October 10, 1978.

McCue immediately contacted the Wilmington town manager and town counsel, who decided to report the matter to the Attorney General's office. With the cooperation of that office and the State police, plans were made to record subsequent conversations between McCue and Thorpe. No attempt was made to obtain a warrant under the procedure outlined in G.L. c. 272, § 99. The town manager decided that Officer McCue, as part of his regular duties for the town of Wilmington, would work with the Attorney General's office and the State police on the investigation of Thorpe, and so informed the chief of the Wilmington police department.[1]

On October 9, 1978, the day before the scheduled meeting with Thorpe, a State trooper outfitted McCue with a "Kel Kit," a short-range radio transmission device secreted on the body and designed to transmit to a receiver, here operated by a State trooper who would tape record any conversation. Thorpe did not show up at the October 10, 1978, meeting.

[1] Under St. 1950, c. 592, § 12, the town manager of Wilmington has supervisory authority over the administration of the police department, including the power to appoint and remove police officers.

Arrangements were then made for McCue to record his telephone conversations with Thorpe. Using the recording equipment supplied by the State police, McCue recorded approximately eight telephone conversations with Thorpe, either from McCue's home in Wilmington or from an electronic equipment room at the Attorney General's office, from October 12 to November 6, 1978. He also recorded two face-to-face meetings with Thorpe on October 20, 1978, using the Kel Kit. The thrust of the various recorded telephone conversations was when and how McCue would receive the examination, and whether a price lower than $4,000 would be acceptable. During the first recorded conversation, Thorpe said he would have to get back to "her," presumably the woman heading up the organization he had referred to earlier, before he could make any definite arrangements with McCue. Thorpe also indicated that misappropriation of examinations was an ongoing operation and that the "progam" was normally offered to just one policeman in each city or town, and only if that person could be trusted. The next morning, Thorpe telephoned McCue, urged complete secrecy, and told him he was not to get a perfect score on the examination, but everything would be arranged for him in advance. On October 19, 1978, McCue had another telephone conversation with Thorpe, during which Thorpe said he expected to hear something later on that night and reassured McCue that there was no problem. During a later conversation Thorpe arranged to meet McCue in front of a restaurant in North Andover. McCue used the Kel Kit to record the brief conversation with Thorpe, the gist of which was that Thorpe wanted McCue to take a ride to a safer place. McCue, fearing for his safety, refused. After the two parted, a State trooper observed Thorpe making a fifteen-to-twenty-minute call from a pay telephone.

When McCue spoke to Thorpe on the telephone later that afternoon, Thorpe said there would be eighty questions on the examination, three involving diagrams. In discussing the scheme of operations, and Thorpe's "sponsorship" of McCue, Thorpe referred to the "committee ... originated by this broad." A few hours later, during a telephone conversation that was poorly recorded, McCue sought another meeting with Thorpe, who said he did not have the examination and had to make a couple of telephone calls. Still later, the two arranged to meet at a doughnut shop in Lawrence. McCue, equipped with the Kel Kit and $4,000, met Thorpe as planned and asked for the examination answers that he thought Thorpe was going to bring. Thorpe did not have them. McCue offered the $4,000, but Thorpe refused unless they went to a safe place, and broke off negotiations when McCue declined to leave with him. Shortly afterwards, Thorpe was seen making a twenty-to-thirty minute call from a pay telephone.

The Sergeant's examination was given on October 21, 1978. As predicted by Thorpe, it contained eighty questions, three involving diagrams.

Pursuant to G.L. c. 272, § 99P,[2] Thorpe moved to suppress the tape recordings. In denying Thorpe's motion to suppress, the judge dismissed Thorpe's contentions that the recording of his conversations violated the Fourth Amendment to the United States Constitution, and art. 14 of the Massachusetts Declaration of Rights. He also concluded that the electronic surveillance did not violate the Federal wiretap statute, 18 U.S.C. § 2518 (1976), or the State interception statute, G.L. c. 272, § 99. In arguing that the motion to suppress should have been granted, Thorpe advances on appeal the same

[2] General Laws c. 272, § 99P, allows defendants in criminal cases to move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom if the communication was obtained by means of an unlawful interception.

arguments as he did below, with the exception of the Fourth Amendment challenge, which he has abandoned.

1. *The Organized Crime Requirement of G.L. c. 272, § 99.*

Thorpe's primary contention on appeal is that the warrantless interception violated G.L. c. 272, § 99, because the requisite organized crime nexus was not shown. For purposes of the statute, interception is defined as the use of an intercepting device to secretly hear or record, or aid another to secretly hear or record, the contents of any wire or oral communication. G.L. c. 272, § 99B4. The statute is framed largely in negative terms: clandestine overhearing or recording of communications is prohibited except as otherwise specifically provided. G.L. c. 272, § 99C. The exceptions to the statutory prohibition include "any person duly authorized to make specified interceptions by a warrant issued pursuant to this section." G.L. c. 272, § 99D1d.[3] Additionally, the following do not constitute interceptions for purposes of the statute: (1) when all parties to the communication consent in advance to the use of the intercepting device; (2) when the interceptor is an investigative or law enforcement officer who is investigating a "designated offense," and who either (a) is a party to the communication or (b) has a party's advance authorization to the interception of the communication. G.L. c. 272, § 99B4.

[3] The procedure for obtaining a warrant to lawfully intercept communications is spelled out in G.L. c. 272, § 99E. Before a warrant may issue, a judge must be convinced "that there is probable cause to believe that a designated offense has been, is being, or is about to be committed" and that interception would lead to evidence of such offense. G.L. c. 272, § 99E2. Further, there must be a showing that "normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried." G.L. c. 272, § 99E3. For a discussion of the statutory warrant procedure, see *Commonwealth* v. *Vitello*, 367 Mass. 224, 231-233 (1975).

"Designated offense," in turn, is defined to encompass a wide spectrum of crimes, including extortion and bribery, when the offenses are "in connection with organized crime as defined in the preamble." G.L. c. 272, § 99B7.

The Commonwealth justifies its warrantless recording of the conversations between Thorpe and McCue on the basis of the § 99B4 exception for law enforcement officers, and the judge denied the motion to suppress on that ground. Thorpe argues that the evidence demonstrates at most an isolated, solitary criminal act on his part, and that the judge therefore erred in finding organized criminal activity.[4]

The initial question we face, then, is how organized crime is to be defined and proved for purposes of bringing warrantless surveillance by law enforcement officers within the § 99B4 exception. We must decide what part of the preamble, set forth in its entirety in the margin,[5] the Legislature in-

[4] We need not dwell on Thorpe's additional argument that McCue was not a law enforcement or investigative officer authorized to make warrantless recordings under G.L. c. 272, § 99B4. The statutory definition of "investigative or law enforcement officer" covers "any officer of the United States, a state or political subdivision of a state, who is empowered by law to conduct investigations of, or to make arrests for, the designated offenses, and any attorney authorized by law to participate in the prosecution of such offenses." G.L. c. 272, § 99B8. Officer McCue, as a member of the Wilmington police department, was an "officer of . . . a political subdivision of [the] state" and had the power to conduct investigations of bribery. Furthermore, McCue's actions in connection with the Thorpe investigation were undertaken at the behest of and in conjunction with members of the State police and the Attorney General's office, who themselves may be classified as investigative or law enforcement officers under § 99B8.

[5] "The general court finds that organized crime exists within the commonwealth and that the increasing activities of organized crime constitute a grave danger to the public welfare and safety. Organized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supply-

tended as the definition of organized crime. We agree with the judge that, although the Legislature declared that the definition of organized crime is to be found in the preamble, the entire description of organized crime could not have been intended to be incorporated in the definition of designated offenses. The statute would be unworkable if the Commonwealth were required to prove, in every case, that the activities constituted "a grave danger to the public welfare and safety," that "brutal and violent tactics" were employed and that "legitimate business activities" were being infiltrated. Rather, of all the language used in the preamble, it appears that the Legislature intended to define organized crime as "a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services."[6]

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ing these goods and services organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living.

"The general court further finds that because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective in the investigation of illegal acts committed by organized crime. Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized criminal activities.

"The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime." G.L. c. 272, § 99A, Preamble.

[6] Statutory definitions of organized crime prevailing in other States similarly focus on the elements of organization, discipline, and the provision of illegal goods and services. See N.H. Rev. Stat. Ann. § 570-A:1, XI (1974); N.M. Stat. Ann. § 29-9-2 (1978); Tenn. Code Ann. § 38-502 (1975).

The judge here concluded that the evidence showed a continuing conspiracy by a well-organized and disciplined group to supply illegally the civil service examinations. Thorpe disputed this, arguing that nothing in the record indicates he had any connection with anyone else in selling the examinations. This contention is plainly wrong, as the record is replete with evidence of an "organization," a "committee," and the need for Thorpe to get approval from others before furnishing McCue with the examination questions and answers. Most such evidence, however, stems from the tape-recorded conversations themselves. In seeking to come within

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The dissenting opinion relies on the legislative history of the Federal wiretap statute, 18 U.S.C. § 2518 (1976), particularly Sen. Rep. No. 1097, 90th Cong., 2d Sess., U.S. Code Cong. & Admin. News (1968). *Post* at - and n.4 (Mass. Adv. Sh. [1981] at - and n.4). We note that, despite words in the United States Senate Report to the effect that the Federal statute is aimed at organized crime, nothing in the statute itself so limits its application. We do not think, therefore, that a helpful parallel can be drawn between the intent of Congress in enacting the Federal wiretap statute and that of our own Legislature in defining "organized crime." The question we face here is what *specific words* in the statutory preamble constitute the legislative definition of organized crime. No indication exists, either in the words of the preamble or in the published legislative history of G.L. c. 272, § 99 (see sources at note 7 *infra*), that the Legislature intended to limit the statute's application to persons with the status of full-time professional criminals—or, in the precise words of the dissent, "to those notorious and readily recognized highly 'structured criminal syndicate[s] composed of professional criminals who primarily rely on unlawful activity as a way of life,'" *post* at (Mass. Adv. Sh. [1981] at). Such a limiting definition would insulate from electronic surveillance all criminal activity, no matter how organized, disciplined, and repeated, carried on by those who maintain legitimate jobs, perhaps in the public service, while at the same time committing the designated offenses set forth in G.L. c. 272, § 99B7. It can be argued, in terms of the value of privacy, that the dissent's narrow definition is good policy, but we are here construing legislative intent, not establishing our concept of the best policy.

the § 99B4 exception, the Commonwealth may not rely on evidence of organized criminal activity gathered from the warrantless surveillance itself. There must be some showing of an organized crime connection *before* the surveillance, not afterward.

In concluding that those involved in the sale of the examinations were a tightly knit group with considerable security and discipline, the judge failed to distinguish between information available to the law enforcement officers before the decision to intercept was made, and information derived from the intercepted conversations. The only pre-surveillance evidence of organized crime referred to by the judge consists of McCue's testimony about his initial conversation with Thorpe, during which Thorpe said the examination was available to him "through an organization headed by a woman." We must determine whether this constitutes sufficient evidence of organized crime for purposes of the § 99B4 exception for law enforcement officers.

We observe first that when the Commonwealth seeks to rely on a narrow exception to the broad statutory prohibition against warrantless surveillance, it is appropriate that the burden of establishing the exception's applicability should rest on the Commonwealth. Cf. *Commonwealth* v. *Antobenedetto*, 366 Mass. 51, 57 (1974) (Commonwealth bears burden of showing reasonableness of warrantless search challenged as invalid under Fourth Amendment). We reject the defendant's contention that the Commonwealth should be required to demonstrate probable cause of the existence of organized crime. Probable cause is the applicable standard when a warrant is sought under G.L. c. 272, § 99E. We do not believe the Legislature intended to require as stringent a showing in situations in which warrantless surveillance is authorized under § 99B4. Nor do we agree, however, with the Commonwealth's assertion that it need only show a good

faith belief on the part of the law enforcement officials that organized crime was implicated. As evidenced by the statutory preamble and the legislative history, the Legislature proceeded on the premise that electronic surveillance is anathema except within certain narrowly prescribed boundaries. See G.L. c. 272, § 99A (the "unrestricted use of modern electronic surveillance devices pose[s] grave dangers to the privacy of all citizens of the commonwealth"). When the Legislature decided, after proposals to the contrary, to allow some warrantless surveillance by law enforcement officers, it also decided, consistent with its concern for the privacy rights of individuals, to limit the reach of the statute to interception of offenses in connection with organized crime.[7] We do not think a subjective standard of good faith belief

[7] In 1964 a special State commission was created to investigate electronic eavesdropping in Massachusetts. The bill proposed by the commission required judicial authorization for *any* interception unless all parties to the communication consented. Report of the Special Commission on Electronic Eavesdropping, 1968 Senate Doc. No. 1132, at 7, 18-19. Law enforcement officers were required, without exception, to obtain warrants before conducting any surveillance. This marked a significant departure from the "one-party consent exception" contained in the former State statute, St. 1959, c. 449, § 1, which exempted from the requirement of prior judicial authorization the interception of communications with the consent of either the sender or the receiver. See *Commonwealth* v. *Douglas*, 354 Mass. 212, 221-222 (1968), *cert. denied*, 394 U.S. 960 (1969). Petitions in the House and Senate, however, advocated retaining the one-party consent exception in all cases. 1968 House Doc. No. 3797. 1968 House Doc. No. 3665. 1968 Senate Doc. No. 355. After considering these petitions, the House Committee on the Judiciary decided to include the one-party consent exception for law enforcement officers only, authorizing them to conduct warrantless electronic surveillance when they were party to the communication or had been given authority by one who was. 1968 House Doc. No. 4875. This exception, as was most of the House bill, was enacted into law by St. 1968, c. 738, § 1. See G.L. c. 272, § 99B4.

would give sufficient effect to this mandatory limitation.[8] At the minimum, the Commonwealth should be required to show that the decision to intercept was made on the basis of a reasonable suspicion that interception would disclose or lead to evidence of a designated offense in connection with organized crime. The standard of reasonable suspicion is an objective one; it is met by a showing of articulable facts from which a reasonable person could conclude that interception would lead to evidence of a designated offense. Cf. *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968); *Commonwealth* v. *Silva*, 366 Mass. 402, 405-408 (1974).

Such a showing has been made here. The circumstances indicate that, on the basis of McCue's initial conversation with Thorpe on October 6, 1978, there existed a reasonable sus-

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The greater power thus accorded police and other law enforcement officers is partially offset by the requirement, not present in the commission's proposal, that the statute be limited to investigation of "offenses in connection with organized crime as defined in the preamble." See G.L. c. 272, §§ 99A, 99B7.

[8] The cases cited by the Commonwealth in support of a good faith standard do not involve wiretap statutes or any surreptitious activity on the part of the government. See *In re Sussman* v. *New York State Organized Crime Task Force*, 39 N.Y.2d 227 (1976); *People* v. *Rallo*, 39 N.Y.2d 217 (1976). *Sussman*, which is less inapposite than *Rallo*, concerned the interpretation of a New York statute giving the Attorney General's office authority to conduct hearings and subpoena witnesses in the course of investigating organized crime activities. The New York Court of Appeals held that, if challenged, the Deputy Attorney General must make a preliminary showing in court that the purpose of his investigation is indeed inquiry into organized criminal activities, by establishing that he is acting in good faith and that the testimony he seeks bears a reasonable relationship to organized crime. *In re Sussman*, *supra* at 232-233. Thus, under the New York statute, the targets of the government's investigation may contest in advance the validity of subpoenas issued against them. No such opportunity for advance judicial review is afforded the targets of the Commonwealth's clandestine recording under the Massachusetts interception statute.

picion that interception of McCue's subsequent conversations with Thorpe would disclose evidence of a continuing conspiracy to unlawfully supply aspirants for promotion to sergeant with the requisite civil service examination. In reaching this conclusion, we rely not only on Thorpe's own statement that the examination was available to him through an organization headed by a woman (which statement itself, contrary to Thorpe's protestations, indicates he was not acting alone in offering to supply the examination), but also on one inescapable inference from that statement. Assuming as we do that upcoming sergeants' promotional examinations are strictly confidential and not readily available, we may infer that a certain amount of discipline and organization would be required to acquire and supply the examinations illicitly.

We thus conclude that the warrantless recording of the conversations between Thorpe and McCue falls within the G.L. c. 272, § 99B4 exception for law enforcement officers.[9]

2. *Claimed Violation of Art. 14.*

Thorpe concedes on this appeal that the recording of his conversations with McCue's consent does not violate the Fourth Amendment to the United States Constitution. See *United States* v. *Caceres*, 440 U.S. 741, 749-751 (1979); *United States* v. *White*, 401 U.S. 745 (1971) (plurality opin-

[9] Contrary to Thorpe's assertion, there is no requirement that "normal investigative procedures" be shown to have failed before the § 99B4 exception comes into play. Such a showing must be made only when a warrant is sought. Chapter 272, § 99E3 (requiring the applicant to demonstrate that "normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried"). As the quoted language demonstrates, Thorpe is wrong in claiming that the State statute does not mention normal investigative proceedings except in the preamble. His preemption argument, which is based on the claimed failure of the State to comply in this respect with 18 U.S.C. § 2518(1)(c) (1976), therefore fails.

ion); *Lopez* v. *United States*, 373 U.S. 427 (1963). While abandoning his Federal constitutional argument, Thorpe argues that the warrantless interception violated his right to be free from unreasonable searches and seizures as guaranteed by art. 14 of the Massachusetts Declaration of Rights, because he had an expectation of privacy in not having his conversation with McCue recorded. For the reasons that follow, we find no constitutional violation.

The Federal constitutionality of warrantless electronic surveillance with the consent of one party to a conversation has been upheld on the ground that when one speaks one voluntarily assumes not only the risk that one's listener may repeat what one says to others, but also the risk that the listener may be recording or monitoring the conversation for broadcast to others. See *United States* v. *Caceres, supra; United States* v. *White, supra* at 751; *Lopez* v. *United States, supra* at 437-440; *Commonwealth* v. *Douglas*, 354 Mass. 212, 221-222 (1968), *cert. denied*, 394 U.S. 960 (1969) (involving challenge under Federal Constitution only).[10] Under this "assumption of the risk" analysis, no search or seizure covered by the Fourth Amendment is deemed to have occurred, and thus no warrant is required.

[10] *United States* v. *Caceres*, 440 U.S. 741 (1979), and *Lopez* v. *United States*, 373 U.S. 427 (1963), each involved one or more recordings made by an Internal Revenue Service agent of a meeting with the defendant, during which the defendant tried to bribe the agent in order to secure favorable tax treatment. In *United States* v. *White*, 401 U.S. 745 (1971), government agents monitored the defendant's meetings with their informant, by way of a radio transmitter concealed on the informant. In *Commonwealth* v. *Douglas*, 354 Mass. 212 (1968), involving the predecessor to c. 272, § 99, no government agent or informant participated in a conversation with the defendant, whose telephoned threats to a private individual were recorded by police officers with the individual's consent.

Envisioning serious intrusions on the right to privacy from the approval of electronic surveillance without prior judicial authorization, opponents of the "assumption of the risk" approach have rejected as unreasonable the premise that one necessarily accepts, or should be forced to accept, the risk of one's conversation being secretly monitored or recorded. See, e.g., *United States* v. *White, supra* at 786, 789 (Harlan, J., dissenting); *Lopez* v. *United States, supra* at 465-466 (Brennan, J., dissenting); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 406-407 (1974); Comment, Electronic Eavesdropping and the Right to Privacy, 52 B.U.L. Rev. 831, 840-841 (1972). While bound by the United States Supreme Court's pronouncements on Fourth Amendment law, at least two State Supreme Courts have interpreted their State constitutional provisions against unreasonable searches and seizures to bar warrantless monitoring and recording without the consent of the speaker. *People* v. *Beavers*, 393 Mich. 554, *cert. denied*, 423 U.S. 878 (1975). *State* v. *Glass*, 583 P.2d 872 (Alaska 1978).[11] Relying largely on Fourth Amendment "expectation of privacy" principles derived from *Katz* v. *United States*, 389 U.S. 347 (1969), these courts have held constitutionally protected one's reasonable expectation that one's private conversation will not be electronically broadcasted or recorded absent consent or a warrant. *Beavers, supra* at 564-566; *Glass, supra* at 875. Cf. *State ex rel. Arnold* v. *County Court of Rock County*, 51 Wis. 2d 434, 439-440 (1971); *Hammond* v. *State*, 354 So. 2d 280, 292-293 (Ala. Crim. App. 1977), *cert. denied*, 439 U.S.

[11] In addition, the Montana Supreme Court relied on that State's constitutional right of privacy to invalidate warrantless electronic monitoring and recording of conversations with the consent of one conversant, thus finding no need to consider separately the State constitutional provision against unreasonable searches and seizures. *State* v. *Brackman*, 582 P.2d 1216 (Mont. 1978).

823 (1978); *Cariday* v. *State*, 552 S.W.2d 759, 769-770 (Tenn. Crim. App. 1976); *State* v. *Albo*, 584 P.2d 906, 908-912 (Utah 1978) (Maughan, J., dissenting) (agreeing with the analysis of *Beavers* and of the dissenting Supreme Court Justices in *United States* v. *White, supra* and *Lopez* v. *United States, supra*).

A primary justification for requiring the government to obtain judicial authorization before proceeding with any electronic surveillance is the possible chilling effect on First Amendment values if warrantless monitoring and recording were permitted. See, e.g., *People* v. *Beavers, supra* at 566; *State* v. *Glass, supra* at 877-878 & n.18; *Lopez* v. *United States, supra* at 452-453, 465-466 (Brennan, J., dissenting); *United States* v. *White, supra* at 787-789 (Harlan, J., dissenting); Greenawalt, The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation, 68 Colum. L. Rev. 189, 216-221, 229-231 (1968); Stone, The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers, 1976 Am. B. Foundation Res. J. 1193, 1255-1257 (1976). The Michigan Supreme Court in *Beavers, supra*, stressed that "[t]he warrant requirement is not a burdensome formality designed to protect those who would engage in illegal activity, but, rather, a procedure which guarantees a measure of privacy and personal security to *all* citizens. . . . Our laws must ensure that the ordinary, law-abiding citizen may continue to engage in private discourse, free to speak with the uninhibited spontaneity that is characteristic of our democratic society." The *Beavers* court was persuaded by Justice Harlan's dissent in *White*, which warned that "words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed" for the eyes and ears of other than one's intended audience.

United States v. *White*, *supra* at 787 (Harlan, J., dissenting). See *Katz* v. *United States*, 389 U.S. 347, 351-352 (1969); *Commonwealth* v. *Hall*, 366 Mass. 790, 794-795 (1975); *Commonwealth* v. *Dinnall*, 366 Mass. 165, 166-167 (1974); Stone, *supra* at 1207-1208 & n.49.

It has been emphasized that the relevant question is not whether criminals must bear the risk of warrantless surveillance, but whether it should be imposed on all members of society. *United States* v. *White*, *supra* at 786, 789-790 (Harlan, J., dissenting). *People* v. *Beavers*, *supra*. Amsterdam, *supra* at 384-385, 402-403. Comment, 52 B.U.L. Rev. at 843-844. In answering this question, we must assess the nature of the particular form of warrantless surveillance and its likely impact on the individuals' sense of security that is the concern of art. 14's protection against unreasonable searches and seizures.[12] In the case at bar we find no violation of the State Constitution. Here, a police officer, known to the speaker as a police officer and sought out by the speaker, recorded his conversation with the speaker. We do not think that free speech and privacy values are unduly threatened by the risk that when one speaks to a known police officer he may be recording the conversation. This is not the type of warrantless surveillance condemned by the courts and commentators discussed above, whose impact on privacy is "such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society." *United States* v. *White*, *supra* at 787 (Harlan, J., dissenting).

We realize that requiring a warrant for *every* electronic surveillance would have the virtues of clarity and predictabil-

[12] See *United States* v. *White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting); Stone, The Scope of the Fourth Amendment: Privacy and the Use of Spies, Secret Agents, and Informers, 1976 Am. B. Foundation Res. J. 1195, 1219.

ity. Given the limited scope of the particular search at issue here, however,—a police officer, known to be such, recording his conversations with an individual—something less than the usual warrant requirement suffices to guard against arbitrary intrusions. Cf. *Terry* v. *Ohio*, 392 U.S. 1 (1968) (police officer entitled to conduct reasonable search for weapons when he has reasonable grounds to believe individual is armed and dangerous, even when no probable cause for arrest exists). In this context, sufficient protection is afforded by our statutory interpretation of c. 272, § 99B4, as requiring any interception by police officer to be based on a reasonable suspicion that interception will disclose or lead to evidence of a designated offense in connection with organized crime. Cf. Amsterdam, *supra* at 416-418, 422. As discussed in part 1 of this opinion, this standard has been met here.

Because on the facts of this case we find no violation of the State Constitution, we need not decide whether other forms of warrantless surveillance would violate art. 14. Nevertheless, it is apparent from the above reasoning of other jurisdictions that the better future course, and the most secure course constitutionally, is for law enforcement officials to procure warrants in cases where probable cause for surveillance can be shown, and even in cases where it does not appear that the statutes require a warrant.

3. The denial of the motion to suppress is affirmed, and the case is remanded to the Superior Court for further proceedings.

So ordered.

LIACOS, J. (dissenting). The court in its opinion disregards the clearly expressed intent of the Legislature to limit electronic surveillance to certain designated offenses involving the activities of "organized crime." The court achieves this result by declaring the legislative definition of organized crime unworkable. This conclusion is without support in the record, and contrary to the clear legislative history of G.L. c. 272, § 99. I am comforted by the opinion in *Commonwealth* v. *Jarabek, post* (1981),[a] decided today, because it indicates, at least, some judicial restraint in rewriting G.L. c. 272, § 99. Nevertheless, the effect of the majority opinion in this case will be, I fear, to permit broad electronic surveillance in areas never intended by our Legislature in the enactment of G.L. c. 272, § 99. The consequence of the majority opinion will be to legitimize electronic intrusion on a broad range of individual activity solely on the basis of "reasonable suspicion" that organized activity by two or more persons may be involved.

It is significant to note that the language found in G.L. c. 272, § 99B7, which precludes electronic surveillance except in regard to designated offenses involving organized crime, is not constitutionally mandated. The inclusion of such limiting language involved a deliberate legislative judgment that this was the appropriate method of balancing the interests of law enforcement against the interest of protecting individual privacy rights.

The determination precisely at which point the respective needs for privacy of communication and for effective law enforcement must mutually yield with regard to authorization of electronic surveillance is a function peculiarly within the province of the Legislature. By refusing to give effect to statutory language defining the term "organized crime," the court today invades that province and usurps that function.

[a] Mass. Adv. Sh. (1981).

By 1967 the Congress of the United States recognized that scientific and technological developments had established the widespread use and abuse of electronic surveillance techniques as a serious threat to privacy of communication in all walks of life.[1] Sen. Rep. at 2154. Concluding that the status of wiretap and electronic surveillance law was intolerable and "serves neither the interest of privacy nor of law enforcement," Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), 82 Stat. 211 (1968). Sen. Rep. at 2154, quoting from Report of President's Commission on Law Enforcement and Administration of Justice. Title III serves the dual purpose of protecting the privacy of wire and oral communications, and delineating on a uniform basis, in conformity with the minimum constitutional standards as set forth in *Berger* v. *New York*, 388 U.S. 41 (1967), and *Katz* v. *United States*, 389 U.S. 347 (1967), the circumstances and conditions under which the interception of wire and oral communications may be authorized. Sen. Rep. at 2153, 2156, 2163. "To assure the privacy of oral and wire communications, Title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers [investigating] ... specified types of serious crimes, and only after authorization of a court order obtained after a showing ... of probable cause." Sen. Rep. at 2153.

The Federal act is not self-executing in so far as State law enforcement authorities are concerned. In order to obtain a wiretap warrant from a State court, there must be a State wiretap statute in effect. *Commonwealth* v. *Vitello*, 367 Mass.

[1] See Senate Report on the Omnibus Crime Control and Safe Streets Act of 1968 (Judiciary Committee), Sen. Rep. No. 1097, 90th Cong., 2d Sess., U.S. Code Cong. & Adm. News (1968) 2112-2309 (hereinafter cited as Sen. Rep. with appropriate pagination to the U.S. Code Cong. & Adm. News).

225, 247 (1975). Recognizing that the law enforcement needs of the different States vary, Congress left the States some latitude to individualize their wiretap statutes. While a State may not adopt standards for obtaining wiretap warrants that are less restrictive than those set forth in Title III, a State is free to adopt more stringent standards. *Id.* at 247.

Massachusetts has enacted a wiretap statute which in several significant respects is more restrictive than Title III.[2] See *Commonwealth* v. *Vitello, supra.* In enacting G.L. c. 272, § 99, "the Legislature proceeded on the premise that electronic surveillance is anathema except within certain narrowly prescribed boundaries." See the court's opinion, *supra* at .[b] Thus, § 99 establishes a particularly "broad statutory prohibition against warrantless [electronic] surveillance."[3] *Id.* at .[c] "When the Legislature decided, after proposals to the contrary, to allow some warrantless surveillance by law enforcement officers, it also decided, consistent with its concern for the privacy rights of individuals, to limit the reach of the statute to interception of offenses in connection with organized crime." *Id.* at .[d]

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[2] Many States have eschewed the use of electronic surveillance as a law enforcement technique. For listing of States which had not enacted an electronic surveillance statute or entirely prohibited such surveillance as of 1976, see Note, Electronic Surveillance—State Authorization of Wiretaps under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 56 B.U.L. Rev. 600, 601 n.14 (1976).

[b] Mass. Adv. Sh. (1981) at .

[3] Contrast, for example, 18 U.S.C. § 2511(2)(C) (permitting warrantless interceptions by law enforcement officers if such officer is party to the communication or on the basis of consent of one of the parties to the communication) with G.L. c. 272, §§ 99B4, 99B7 (permitting warrantless surveillance under similar circumstances only in the course of investigation of a designated offense in connection with organized crime).

[c] Mass. Adv. Sh. (1981) at .

[d] Mass. Adv. Sh. (1981) at .

Despite professing obeisance to these principles, the court today so broadly defines organized crime, and so loosely applies that definition, as to substantially strip the statute of its intended restrictive effect. Ignoring much of the statutory language, the court defines organized crime as "a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services." *Id.* at .* Nevertheless, the court finds the requisite connection to organized crime in this case by inferring that a "certain amount" of discipline and organization would be required to acquire illicitly, the examinations in issue. *Id.* at .† Assuming such an inference is warranted, this quantum of organization falls far short of that required by the statute or even under the court formulation. One could easily infer that a "certain amount" of discipline and organization would be required to achieve the objective of any conspiracy.

The highly descriptive language in the preamble of the statute, as well as the common understanding of the term "organized crime," suggest a much higher order of criminal activity and organization than is revealed on the facts of this case. The term "organized crime" refers to those notorious and readily recognized highly "structured criminal syndicate[s] composed of professional criminals who primarily rely on unlawful activity as a way of life," *Masiello* v. *Norton*, 364 F. Supp. 1133, 1135 (D. Conn. 1973), and not to criminal conspiracies, generally.

Like § 99, the "major purpose of [the law enforcement component of] Title III is to combat organized crime." Sen. Rep. at 2157. The legislative history of Title III sets forth a lengthy description of organized crime which is in many respects strikingly similar to, but provides greater detail than, that set forth in the preamble to G.L. c. 272, § 99. The

* Mass. Adv. Sh. (1981) at .
† Mass. Adv. Sh. (1981) at .

statutory definition of organized crime set forth in G.L. c. 272, § 99A provides: "The general court finds that organized crime exists within the commonwealth and that the increasing activities of organized crime constitute a grave danger to the public welfare and safety. Organized crime, as it exists in the commonwealth today, consists of a *continuing* conspiracy among *highly organized* and *disciplined* groups to engage in supplying illegal goods and services. In supplying these goods and services organized crime commits *unlawful acts* and *employs brutal and violent tactics*. Organized crime is *infiltrating legitimate business* activities and *depriving honest businessmen* of the right to make a living" (emphasis supplied).

The Legislature enacted this provision in full awareness of recent constitutional decisions and the legislative history of the Federal act (Title III). See Report of the Special Commission on Electronic Eavesdropping, 1968 Sen. Doc. No. 1132; Message of Governor John A. Volpe to the House and Senate, 1968 House Doc. No. 3797. Thus the enactment of G.L. c. 272, § 99, must be viewed in juxtaposition with the background of the enactment of the Federal statute. When the preamble is read in juxtapose with this legislative history, which is excerpted at length in the margin,[4] it becomes unmistakably clear that the Legislature did not intend its definition of organized crime to be so broad as the court suggests.

[4] In setting forth excerpts from the legislative history of Title III, I emphasize, by italicizing, those portions of the description of organized crime which most closely parallel the language of the preamble: "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. . . . *The major purpose of title III is to combat organized crime.* . . . Ignored entirely in the development of our system of justice . . . was the possibility of the growth of a phenomenon such as modern organized crime with its attendant corruption of our political and

The court posits that effectuation of much of the descriptive language appearing in the preamble would render the statute unworkable. However, every word of a legislative enactment is to be given force and effect, if possible. Contrary to the court's contention, it would not be necessary under the statute to prove in every case that "a grave danger to the public welfare and safety" and that "brutal and violent tactics" are involved in the commission of each designated of-

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law enforcement processes. We have always had forms of organized crime and corruption. But there has grown up in our society today *highly organized, structured and formalized groups of criminal cartels*, whose existence transcends the crime known yesterday, for which our criminal laws and procedures were primarily designed. . . . These hard-core groups have become more than just loose associations of criminals. They have developed into corporations of corruption, indeed, quasi-governments within our society, presenting a unique challenge to the administration of justice. . . . Today . . . [organized crime] is active in, and largely controls, professional gambling . . . [and] has an almost monopolistic control over the illegal importation, distribution and sale of narcotics. . . . Loan sharking, finally, is everywhere dominated by organized crime. . . . *Organized crime has not limited itself to criminal endeavors. It has large spheres of legitimate business and union activity undermining our basic economic mores and institutions. . . . Organized crime flourishes best only in a climate of corruption.* . . . Victims, complainants, or witnesses are unwilling to testify because of apathy, fear, or self-interest, and the top figures in the rackets *are protected by layers of insulation and direct participation in criminal acts.* Information received from paid informants is often unreliable, and a stern code of discipline inhibits the development of informants against organized criminals. In short, intercepting the communications of organized criminals is the only effective method of learning about their activities. . . . [U]nder 'present procedures too few witnesses have been produced to prove the link between criminal group members and the illicit activities that they sponser [*sic*]. Victims do not normally testify for they are already in bodily fear or they are compliant. . . . [T]he securing of an evidentiary substitute for live testimony, which is not subject to being eliminated or tampered with by fear or favor, is necessary.'" (Emphasis supplied.)

fense. Rather, it is only necessary to show some "connection" between the designated offense and those criminal groups designated in the preamble as organized crime. G.L. c. 272, § 99B7. The quantum of proof required to establish the organized crime connection is not so high as to render the statute unworkable. While the "wall of secrecy" surrounding organized crime renders it peculiarly difficult to gather evidence sufficient to obtain convictions of organized crime figures, G.L. c. 272, § 99A, Sen. Rep. at 2159-2160, it is also common knowledge that organized crime connections are well-known to law enforcement agencies. Thus, a connection with organized crime may generally be susceptible of proof by "articulable facts" amounting to "reasonable suspicion." See the court's opinion, *supra* at .[g]

In conclusion, I see no reason not to give full meaning to all the language of G.L. c. 272, § 99. Such an approach would fully effectuate the dual purposes of the statute of enabling law enforcement officers, upon a reasonable showing of a connection with organized crime, to more easily gather evidence through the use of electronic surveillance, while protecting "the privacy of all citizens of the commonwealth" from the "grave dangers" which would be attendant to the use of electronic surveillance as a general criminal investigative technique. G.L. c. 272, § 99A. I dissent.

[g] Mass. Adv. Sh. (1981) at .

Appendix B.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
NO. 79-388

COMMONWEALTH	
v.	MEMORANDUM OF DECISION ON DEFENDANT'S MOTION TO SUPPRESS
FRANCIS THORPE	

The defendant was indicted in February, 1979, under General Laws Chapter 268A, Section 2(a)(2), charging that "on or about October 6, 1978, and . . . [to] November 6, 1978 . . . [he did] corruptly give, offer and promise something of value to a municipal employee with intent to influence such an employee to commit and aid in committing and collude in, and allow a fraud, and make opportunity for the commission of a fraud on the Commonwealth and State, and county and municipal agency."

From conferences with the assistant attorney general in charge of the case and his opening at the hearing, it appears to the Court that the Commonwealth expects to prove that the defendant, a former police officer retired on a disability, had access to answers to questions in an examination to be given to police officers seeking promotion to sergeant and offered the same to Wilmington Police Officer David McCue for a price of $4,000.

On October 4, 1979, defendant filed his motion to suppress:

"1. The contents of each and every interception of wire or oral communications of the defendant, specifically, but not limited to any and all interceptions of wire or oral communications between the defendant and one David McCue," and

"2. Any and all evidence derived from the contents of each and every interception of wire or oral communication of defendant."

The motion was based on (1) General Laws Chpater 272, Section 99, (2) the Fourth and Fourteenth Amendments to the United States Constitution, (3) Article XIV of the Declaration of Rights of the Commonwealth of Massachusetts, and (4) 18 U.S.C. Section 2518.

The Court heard testimony and argument and received briefs. It makes the following:

FINDINGS OF FACT.

1. A town-manager form of government was established for the Town of Wilmington by Acts 1950, c. 592. Chapter 592 has the force of a town charter. *See* Mass. Const., Art. of Amend., Art. II, § 9. Section 12 of c. 592 provides in substance that the town manager should have the power and duty to supervise and direct the administration of all departments, commissions, boards and offices, except selectmen, school committee, moderator, members of the Wilmington Housing Authority, board of appeals, election officers, registrars of voters, the town clerk, constables, town counsel and town accountant. He has the authority to appoint and remove, subject to the provisions of Chapter 31 of the General Laws, the Chief of Police and police officers.

2. David McCue was appointed a full time, permanent police officer of the town of Wilmington on July 15, 1973.

3. In 1970 McCue had become acquainted with the defendant.

4. The Court infers that for some time prior to October 6, 1978, McCue was interested in being promoted to sergeant and had been studying hard for the October 21, 1978 examination.

5. On October 6, 1978, at about 2:45 p.m., McCue, then at his home in Wilmington, received a call from defendant, whose voice he recognized. The defendant told him that he understood that McCue was studying for the sergeant's exam and that he, defendant, had available, through an organization headed by a woman, the exam (including, I infer, the answers) which he would sell to McCue for $4,000. Defendant said that he would meet McCue at the Wilmington Ford Agency premises on October 10, 1978.

6. McCue, within minutes after the telephone conversation, conferred with the Town Manager, Sterling Morris, who called Town Counsel, Allan Altman, and the three met at Altman's office at about 3:15 p.m.

7. A decision was made to report the matter to Steven Delinsky of the Attorney General's office. The chain of command at the Attorney General's office with respect to State Troopers was as follows: Steven Delinsky was at the apex; directly below him were Assistant Attorneys General Robert Greco and John Bonistalli; below them and regularly attached to the Attorney General's office was Sergeant John Joyce, and below him Troopers Robert Cummings, Robert Zepf, Francis O'Brien, Joseph Flaherty and John McDonough. In a different line, assigned to special matters, were State Police Captain Peter Agnes, and below him Detective Lieutenant Joseph Denehy.

8. Morris and Altman reported the matter to Delinsky, who in turn reported the matter to Peter Agnes, who in turn conferred with Joseph Denehy. Thereafter, at the Attorney Gen-

eral's office there was a conference of Delinsky, Greco, Agnes and Denehy. Sergeant Jack Joyce was put in charge of the matter and conferred with Trooper Robert Zepf, I infer as to the most efficient manner in which to collect evidence of the defendant's illegal activity. A cooperative plan was evolved to record conversations.

9. On Sunday, October 8, 1978, at about 6:30 p.m., McCue and Morris went to Altman's office where they conferred with Joe Denehy, Joyce, Assistant Attorney General Bob Greco and Assistant Attorney General John Bonistalli, at which time it was suggested that McCue keep his date with defendant on October 10, and I infer plans were made to record conversations with defendant.

At 9:00 p.m. that day, McCue, at Altman's office, met with Assistant Attorney General Steve Delinsky and Denehy. McCue asked Delinsky if he and his family could receive some protection or new identity if he exposed the facts that he had. He was told that everything possible would be done but that he, as a police officer, had to set a good example of disclosure of criminal activity. McCue agreed. Further plans were made for recording any conversations with defendant on October 10.

10. After the conference, Morris was of the view that Officer McCue, as part of his regular duties for the Town of Wilmington, would work with the Attorney General and the State Troopers associated with that office.

At no time did McCue discuss his conversations with defendant with the Chief of the Wilmington Police Department. I infer that as a result of McCue's conferences he was asked to cooperate and work with the Attorney General's office, and they with him, in an attempt to obtain evidence of illegal activity by defendant. McCue subjectively believed that he was working with the Attorney General with the direction and approval of Morris whom he considered his superior.

On Monday, October 9, 1978, Morris told the then Chief of the Wilmington Police Department, Paul Lynch, of the assignment of McCue to work with the Attorney General.

11. On October 9, at the premises of Sweetheart Plastics in Wilmington (where, I infer, he was on a detail) McCue met with Zepf, Joyce, and Denehy, and possibly also an Assistant Attorney General. During this meeting, Zepf, who had special training and experience in intercepting devices, equipped McCue with and explained the operation of a "Kel Kit," a short-range (100 yards - ¼ mile), low power (200-250 milliwatt), small (½" x 1½" x 2¼") radio transmitter with a wire antenna attached, designed to transmit to a receiver (the size of a small briefcase) to be operated by Zepf out of sight and by him recorded on a tape recorder. Zepf made such a recording three or four times a year.

12. On October 10, 1978, at about 7:00 a.m., McCue went to the Wilmington Ford premises to keep his date with defendant and waited until about noon but defendant did not appear.

At about 12:30, McCue, at a DeMoulas Market nearby, conferred with Assistant Attorney General John Bonistalli about the possibility of obtaining a search warrant for any physical material (such as exams or answers) which might be revealed. Joyce and Zepf were also present. I infer that during this meeting a plan was devised whereby McCue would talk with defendant on the telephone and arrangements would be made to record such conversations. Zepf gave McCue equipment necessary for such recording, consisting of a tape recorder and a suction cup with which to attach an induction microphone to the receiving end of a telephone.

13. On Thursday, October 12, 1978, McCue called defendant from Zepf's office in the Attorney General's building having gotten the telephone number, 324-0939, from a state trooper. Also present at some time was Zepf, Joyce and Denehy.

Robert Cummings and Assistant Attorney General William Linehan may also have been present for part of the time. This conversation was recorded, Exhibit 1 and 1A. During the conversation, McCue pretended to bargain for a lower price, but defendant said he would have to get back to "her" (the female, heading up the organization). Thorpe indicated that time was of the essence. Thorpe also indicated that the misappropriation of exams was an ongoing operation, that he also had to check with one "John," and that the "ball game" was normally offered to only one person in each city or town.

14. At about 8:05 a.m. on October 13, 1978, McCue, while at his home in Wilmington, had another telephone conversation with defendant. This was similarly recorded, Exhibit 2 and 2A, and during it Thorpe urged complete secrecy, told McCue that he could not get a perfect score on the test but had to "blow a couple of them," but that this would be arranged in advance.

15. On October 18, 1978, three efforts were made to record telephone conversations from the Attorney General's office, but each was unsuccessful. These efforts were by a different technique. A Mark 4 telephone starter was attached to the terminals corresponding to the telephone in the Attorney General's "tack room" (where electronic equipment was stored) in series with a tape recorder. The telephone starter was to transform the power from the telephone line sufficient for clear recording. A recorded message from defendant's end was the only thing received, Exhibit 3 and 3A.

16. At 9:21 p.m. on October 19, McCue, while at his home in Wilmington, had another conversation with defendant which was recorded, Exhibit 4 and 4A. In that conversation, defendant indicated he still had not heard from his superiors in the organization and urged McCue to be patient.

17. On October 20, about midday, McCue met with Zepf and Joyce at Sweetheart Plastics. Later, McCue, from his home

in Wilmington, made three recorded telephone calls to defendant, Exhibits 5, 6, 7, and 5A, 6A and 7A. A date was made to meet at the Ground Round in North Andover. At 2:15 p.m. at the Ground Round in Andover, McCue used the Kel Kit to record a 1-2 minute conversation with defendant. The recording was of poor quality. The gist of the conversation was that defendant wanted McCue to take a ride with him in order to go to a safer place. McCue declined, saying that he would see the defendant later. One of the reasons that McCue declined to go elsewhere with defendant was that he was unarmed and knew that defendant was always armed. After McCue and defendant parted, Joyce observed defendant make a 15-20 minute telephone call from a pay station.

At 4:43 p.m., McCue called defendant from his home but a different person answered. At 5:05 p.m., defendant called McCue and the conversation was recorded, during which defendant said there would be 80 questions on the exam, three involving diagrams. At 6:20 p.m., McCue called defendant from his home but got an answering service message, Exhibit 7 and 7A. At 8:51 p.m., from his home, McCue called defendant and made a recording, Exhibit 7 and 7A, of poor quality. The gist of the conversation was as follows: McCue sought another meeting, defendant said he had to confer with his people, McCue indicated his understanding that he would see the examination before the two of them went for a ride, but defendant said he did not have the examination but would show him the answer sheet as a sign of good faith. At 9:45 p.m., from his home, McCue called defendant but got no answer. At 10:04, the same. At 10:05, defendant called McCue at his home and the two arranged to meet that night at Dunkin Donuts in Lawrence. McCue then travelled to the Andover barracks where he was equipped with the Kel Kit and $4,000. He then travelled to the Dunkin Donuts in Lawrence where he conferred with defendant and recorded the conver-

sation, Exhibit 8 and 8A, which was as follows: McCue asked for the answers; defendant did not have them; McCue offered the $4,000; defendant declined until they went to a safer place; McCue declined to go anywhere, and defendant broke off negotiations. At about 11 p.m. defendant was seen by Joyce making a 20-30 minute telephone call from a pay station. In their conversation, defendant referred to "the committee . . . originated by this broad."

18. The sergeant's exam was given on October 21, 1978 and, as predicted, contained 80 questions, three involving diagrams.

19. McCue never prepared any written reports but reported orally to Morris. He was paid throughout by the Wilmington Police Department, including some overtime. He received no compensation from the Attorney General's office.

20. I infer that those involved in the theft and sale of the answers to the sergeant's exams were a tightly knit group with considerable security and discipline.

21. McCue authorized the State Police to record all the conversations that he conducted and which were transmitted by the Kel Kit, and also all those which were recorded at the Attorney General's office by the State Troopers.

22. The standard procedure of the Attorney General and police for court ordered wiretaps is different from that used here. In such cases, the telephone company is enlisted to advise where there are "appearance points" (i.e. where the wires can be plugged into) the police select the most convenient location, and the telephone company builds a leased line to a rented site where the police conduct monitoring. The telephone company is paid for their assistance.

23. On November 6, 1978, at 2:45 p.m. at the Attorney General's office with Assistant Attorney General Linehan and Robert Cummings, McCue had another telephone conversation with Thorpe which was recorded, Exhibit 9, discussing

an article in the *Boston Herald* concerning an alleged sale of the state exam, referring particularly to the October 21 police exam.

DISCUSSION.

Defendants seek to suppress both the tapes (Exhibits 1-9) and any testimony by Officer McCue pertaining to their contents, all pursuant to sub-section "P" of General Laws Chapter 272, Section 99, which provides that "any person who is a defendant in a criminal trial in a court of the Commonwealth may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom for the following reasons. . . ." The definition subsection B-5 defines "contents, . . . when used with respect to any wire or oral communication, [as] any information concerning the identity of the parties to such communication or the existence, contents, substance, purport or meaning of that communication."

1. *Federal Constitution.*

Defendants claim that the recordings violated the Federal Constitution. It is clear that that position is unsound. *See United States v. White*, 401 U.S. 745, 749 (1971); *United States v. Jones*, 545 F.2d 1112, 1114 (8th Cir. 1976); *Hoffa v. United States*, 385 U.S. 293, 302 (1966); *See also Flemmi v. Gunter*, 410 F. Supp. 1361, 1368 (D. Mass. 1976); and *compare Commonwealth v. Look*, Mass. Adv. Sh. (1980) 537, 550 n.9 (holding that if the recording satisfies the State Statute it also satisfies the Fourth Amendment to the United States Constitution.)

2. *Massachusetts Constitution.*

Defendant claims that the recordings violate the State Constitution He offers no cases in support. The position is unsound. Under the pre-1968 law, it was clear that where there was one party consent, the recording was not unconstitutional under either the Federal or State Constitution. *See Commonwealth v. Douglas*, 354 Mass. 212, 222 (1968). *See also Flemmi v. Gunter, supra* at 1368 f.7. In *District Attorney for the Plymouth Dist. v. N.E. Tel. & Tel. Co.*, Mass. Adv. Sh. (1930) 197, the dissenting justice suggested that a recording might constitute a search if there were no probable cause. However, here it is clear that Officer McCue had probable cause.

3. *Federal Statute.*

Defendant claims that the recordings violated the Federal Statute. Nothing could be clearer than that they do not. A one-party consent, by a policeman or a citizen, is permissible under the Federal Statute. *See* 18 U.S.C. § 2511(2)(c) and (d). *See also United States v. White, supra; United States v. Gladney*, 563 F.2d 491, 493 (1st Cir. 1977); and particularly *United States v. Horton*, 601 F.2d 319, 320 (7th Cir. 1979), where the facts are very similar.

Defendant argues that normal investigative procedures must have been tried and have failed or reasonably appear unlikely to succeed, *see* 18 U.S.C. § 2518(1)(c), before a legal wiretap may be made. However, it is clear that this requirement only applies where a wiretap warrant is sought. *See Commonwealth v. Vitello*, 367 Mass. 224, 259 (1975) and 18 U.S.C. § 2518(1)(c).

4. *State Statute.*

A. *Defendant's Arguments*—Defendant attacks the recordings on the theory that McCue was not a "law enforcement officer" who had "power of arrest" the defendant in all of the locations where he and the defendant were located when the recordings were made. He would appear to concede, however, that McCue had such authority with respect to the several recordings made at his home in Wilmington on October 6, 13, 19 and 20, 1978.

Defendant further argues that there is no showing that Officer McCue or the Attorney General were investigating "designated offenses" in connection with organized crime as organized crime is defined in the preamble since there was no evidence of employment of brutal and violent tactics, nor infiltrating legitimate business activities and depriving honest businessmen of their right to make a living. Defendant also suggests that federal cases defining organized crime as requiring five or more participants should be read into the statute. Defendant claims that *Vitello* incorporated into the State Statute the federal requirement of "exhaustion"* of normal investigatory techniques, *see* 18 U.S.C. 2518(1)(c), even in the warrantless situation.

B. *Commonwealth's Arguments*—The Commonwealth argues that McCue was a police officer, had the power of arrest generally, and the statute should be so construed. Alternatively, the Commonwealth argues that the State Troopers and the Attorney General had powers of arrest throughout the state and had been authorized by McCue to record the communications. They, in turn, did the recording with McCue's assistance by supplying him with the suction microphone and the Kel Kit.

* The Court's abbreviation.

The Commonwealth also argues that the only definition that should be carried from the preamble into the Section B-7 is that requiring evidence of a conspiracy among groups who engaged in supplying illegal goods and services. Finally, the Commonwealth argues that the "exhaustion" provisions of both the State and Federal Statutes pertain only to warrants.

C. *Decision*—The Court finds the Commonwealth's arguments more persuasive. The definition of "interception" in Section B-4 provides that "... it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication *if the officer is a party* to such communication *or has been given prior authorization* to record or transmit the communication *by such a party*. ..." (Emphasis added).

Sub-section B, paragraph 8, defines "investigative or law enforcement officer" as "any officer of ... a state or a political sub-division of a state, who is empowered by law to conduct investigations of or to make arrests for, the designated offenses, and any attorney authorized by law to participate in the prosecution of such offenses."

The term "designated offense" is defined in sub-section B, paragraph 7, to "include the following offenses in connection with organized crime as defined in the preamble: ... bribery. ..."

Statutes must be interpreted by giving their words ordinary meaning and resolving any ambiguities in such a fashion as to make the statute a meaningful, workable whole capable of implementing its obvious purpose. *See e.g., Bd. of Ed. v. Assessor of Worcester*, 368 Mass. 511 (1975); *Beloin v. Bullett*, 310 Mass. 206 (1941).

McCue was clearly an officer of a political sub-division of the state and had authority to conduct investigations and to make arrests for bribery. To read into the statute the additional requirement that he had such authority in all of the

locations where he and defendant were located during the communications would make the statute unworkable.

In any event, even if McCue is not an investigative or law enforcement officer within G.L. c. 272, § 99, the tapes need not be suppressed because the Assistant Attorneys General and the State Police officers involved in the case are such investigative or law enforcement officers. The Attorney General has broad powers to investigate all violations of law; *see* G.L. c. 12, § 10, *Commonwealth v. Kozlowsky*, 238 Mass. 379, 388 (1921); and to appoint assistant attorneys general as needed, *see* G.L. c. 12, § 2 and such assistants as are necessary to carry out his investigatory powers, *see* G.L. c. 12, § 10, *Commonwealth v. Kozlowksy, supra* at 384. State Police officers have the powers of police officers, including the authority to arrest and participate in a prosecution of bribery, and may exercise those powers throughout the state. *See* G.L. c. 147, § 2.

The obvious policy behind the statutory scheme is that such law enforcement officers are sufficiently reliable that they should be permitted to record when they are parties to the communication or have been given authorization by such parties. The broad distinction to be kept in mind is between the recording of a conversation in which one party is consenting, on the one hand, and eavesdropping on conversations of two other people, neither of whom consent, on the other. If the Court is wrong in the above analysis, it would still appear that the Kel Kit transmissions would be admissible since they were recorded exclusively by State Troopers working with and for the Attorney General.

Also, in contrast to *United States v. White, supra*, decided under the Federal Statute, which held that even if the tapes were suppressed, the witness could testify from memory, the statute Section "P" seems to be more restrictive in suppressing the "contents" of communications. However, the defini-

tion refers to both oral and wire communications, and "oral communication" is defined in Section B-2 as speech except such speech as is transmitted over public airways by radio or other similar devices. The Kel Kit transmissions were so transmitted.

The recordings not made by McCue while in Wilmington were made by State Troopers or Assistant Attorneys General who had been given prior authorization to make them by McCue, a party to the conversation. Since the State Troopers and Assistant Attorneys General are investigative or law enforcement officers, these recordings, too, come within the statutory exception to "interception" so long as the investigation concerned a "designated offense."

An offense, such as bribery, in connection with organized crime as defined in the preamble is a designated offense. The preamble provides that "[o]rganized crime, as it exists in the Commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services, organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living."

All of this lengthy description of organized crime could surely not have been intended to be carried into the definition of designated offense. It is clear from that that the preamble intentionally limits the application of the statute to certain criminal investigations. However, the statute would be totally unworkable if, in every case, the Commonwealth was required to prove that the activities constituted "a grave danger to the public welfare and safety," that they were performed by "highly organized and disciplined groups," that "brutal and violent tactics" were employed and that "legitimate business activities" were being infiltrated.

The Court is of the opinion that that portion of the preamble intended to be carried into the definition of designated offense is that which refers to a "continuing conspiracy among . . . groups to engage in supplying illegal goods and services." To require more would defeat the purpose of the statute, which was enacted precisely because organized crime is so difficult to uncover and prove. *See* G.L. c. 272, § 99, Preamble.

A conspiracy is complete on the agreement of two or more persons to commit an illegal act. *See Commonwealth v. David,* 335 Mass. 686 (1957). The evidence indicates that there was such a conspiracy. There was also evidence that it was continuing. If necessary, it was also well organized and disciplined. The Court finds that this part of the statute has been satisfied.

There is no merit to defendant's "exhaustion" argument, since that requirement relates only to the warrant procedure. *See Commonwealth v. Vitello, supra* at 259.

RULING.

The defendant's Motion is consequently DENIED.

By the Court,

ROBERT J. HALLISEY
Justice of the Superior Court
6/23/80

Entered _____

Trial to follow Commonwealth v. Lunde 79-388 scheduled for 7/7/80.

ROBERT J. HALLISEY

Appendix C.

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH.

AT BOSTON, August 5, 1981.

IN THE CASE No. SJC-2320.

COMMONWEALTH

v.

FRANCIS THORPE

pending in the Superior Court Department of the Trial Court for the County of Middlesex No. 79-388

ORDERED, that the following entry be made in the docket; viz., —

The denial of the motion to suppress is affirmed, and the case is remanded to the Superior Court for further proceedings.

BY THE COURT,

PATRICK J. HURLEY, CLERK.

August 5, 1981

See opinion on file.

Appendix D.

18 U.S.C. Section 2518(3)

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter [18 USCS § 2516];

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

Appendix E.

MASSACHUSETTS GENERAL LAWS
CHAPTER 272 SECTION 99(E)

E. Warrants: when issuable:

A warrant may issue only:

1. Upon a sworn application in conformity with this section; and

2. Upon a showing by the applicant that there is probable cause to believe that a designated offense has been, is being, or is about to be committed and that evidence of the commission of such an offense may thus be obtained or that information which will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense may thus be obtained; and

3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

Appendix F.

EXCERPT P.39 BRIEF FOR THE DEFENDANT-APPELLANT

"While the appellant recognizes that the current state of the law is well-settled, that one-party consent eavesdropping is not a Fourth Amendment violation *United States v. White*, 401 U.S. 745, 91 S. Ct. 1122, 18 L. Ed.2d 453 (1971). *United States v. Santillo*, 507 F.2d 629 (3d Cir.), *cert. denied*, 421 U.S. 968, 95 S. Ct. 1960, 44 L. Ed.2d 457 (1975); *United States v. Lippman*, 492 F.2d 314, 318 (6th Cir. 1974), *cert. denied*, 419 U.S. 1107, 95 S. Ct. 779, 42 L. Ed.2d 803 (1975); *United States v. Bonanno*, 487 F.2d 654, 658 (2d Cir. 1973)," Mr. Thorpe now asks this Court to review this position in view of the above discussion of G.L. Chapter 272, Sec. 99.

Opposition

81-838

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DEC 7 198

No. A-284

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1981.

FRANCIS THORPE,
PETITIONER,

V.

THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE RESPONDENT IN OPPOSITION

FRANCIS X. BELLOTTI
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QUESTIONS PRESENTED FOR REVIEW.

I. Whether Petitioner's reasonable expectation of privacy in not having his private conversations recorded, transmitted, and disclosed as guaranteed by the Fourth Amendment were violated by the interception of a conversation when the other party but not the petitioner consented to the interception.

II. Whether the interception violated 18 U.S.C. §2518 (1)(c) when normal investigative procedures were not tried prior to the use of electronic interception.

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I. The United States Supreme Court does not have the required jurisdiction under 28 U.S.C. §1257 because the judgement by the Massachusetts Supreme Judicial Court entered on August 5, 1981, was the result of an interlocutory appeal and not a final judgement by the state's highest court 6

II. The petitioner had no reasonable expectation of privacy in not having his private conversations recorded, transmitted and disclosed. Therefore, because there was no expectation of privacy there was no Fourth Amendment violation. Recording of the petitioner's conversation

comported with the appropriate federal and state statutes, and as such did not constitute an interception 7

III. The recording, transmission and disclosure of petitioner's conversations did not violate 18 U.S.C., §2518 (1)(c) because that section deals with wiretap orders as opposed to 18 U.S.C. §2511(2)(c) and (d) which deals with one-party consent recordings 9

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Appendix A - Mass. G. L. c. 272 §99 B.4.

TABLE OF AUTHORITIES CITED.

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No. A-284

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1981.

FRANCIS THORPE,
PETITIONER,

V.

THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE RESPONDENT IN OPPOSITION

The Respondent prays that the petition for a writ of certiorari be denied.

OPINIONS BELOW.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts (filed August 5, 1981) is reported at 424 N.E.2d 250 (1981). (Thorpe's Petition, App. A1).

JURISDICTION.

The jurisdiction of the Supreme Court is invoked by petitioner pursuant to 28 U.S.C., §1257 (3), as will be argued below, the order of the Supreme Judicial Court is not a final judgment, but is merely an interlocutory decision. Therefore, respondent contests the jurisdiction of the court to grant review.

STATUTES INVOKED.

MASSACHUSETTS GENERAL LAWS, C. 272, §99B.4. The text of which is annexed hereto as Appendix A.

STATEMENT OF THE CASE.

The Petitioner, FRANCIS THORPE, was indicted in Middlesex County of the Commonwealth of Massachusetts in February, 1979. He was charged with violating Massachusetts General Laws, c. 268A,

§2(A)(2), which prohibits corruptly offering something of value to a municipal employee.

He filed a Motion to Suppress in the Superior Court. (Thorpe's Petition, App. 25). After an evidentiary hearing the motion was denied and a written findings of facts issued (Thorpe's Petition, App. 26). The petitioner sought an interlocutory appeal. The Supreme Judicial Court affirmed Commonwealth v. Thorpe, 424 N.E.2d 250 (1981).

The facts pertinent to the Motion to Suppress are briefly stated as follows:

At all times relevant, Officer David McCue was a regular member of the Town of Wilmington Police Department. The Petitioner was a former member of the Metropolitan District Commission Police

Department and a Detective Lieutenant on the Massachusetts State Police.

On October 6, 1978, the petitioner called Officer McCue on the telephone. At that time, he offered to provide McCue with a copy of the upcoming civil service police sergeant's promotional examination for the sum of $4,000. The Massachusetts Department of the Attorney General was notified.

From that date of October 6 to November 6, 1978, Officer McCue worked with the Department of the Attorney General and it's State Police Unit in order to identify the members of the organization who stole civil service promotional examinations and disseminated them on a state-wide basis to those who were to take the examinations and were willing to pay for the advance copy.

The Department of the Attorney General and it's State Police Unit supplied McCue with a cassette recording device and a suction cup with a wire lead which allowed McCue to record telephone conversations with the petitioner from McCue's home telephone. Telephone conversations between the two were also recorded from the T.A.C. Room located within the Department's office complex.

McCue recorded telephone conversations he had with the petitioner from October 12 to November 6, 1978. McCue also attempted to record two (2) face-to-face meetings with the petitioner on October 20, 1978, with a radio transmission device secreted on his person.

At all times during the recordings and attempted recordings Officer McCue was a

party to the conversations, he was involved in a criminal investigation with Assistant Attorneys General and State Police Troopers of a "designated offense" involving members of an organized group.

REASONS FOR DENYING WRIT.

The writ of certiorari should not issue for the following reasons:

I. THE UNITED STATES SUPREME COURT DOES NOT HAVE THE JURISDICTION TO GRANT THE PETITIONERS WRIT OF CERTIORARI BECAUSE THE ORDER ENTERED BELOW, WAS NOT A FINAL JUDGEMENT.

The jurisdiction of the Supreme Court to review a state decisions extends only to "final judgments or decrees rendered by the highest court of a state in which a decision could be had." 28 U.S.C. §1257. In the petitioner's case, there is no final judgment rendered by the Supreme Judicial

Court of Massachusetts.

The decision below merely affirmed, on interlocutory appeal, the decision of the trial court denying a motion to supress. Petitioner has been neither tried, convicted, nor sentenced.

> Final judgment in a criminal case means sentence. The sentence is the judgment. Berman v. United States, 302 U.S. 211, 212 (1937).1/

II. THE UNITED STATES SUPREME COURT HAS CONSISTENTLY HELD ONE-PARTY CONSENT RECORDING OF CONVERSATIONS DO NOT VIOLATE THE FOURTH AMENDMENT.

In 1966, this Court held that the

1/ See also: Parr v. United States, 351 U.S. 513, 518 (1956): and United States, v. MacDonald, 435 U.S., 850, 853 - 854 (1977).

Fourth Amendment did not bar divulgence of a conversation by a party to that conversation. Hoffa v. United States, 285 U.S. 293 (1966). The Court stated at 302:

> Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.

In the instant case, the Massachusetts Supreme Judicial Court relying upon this Court's decision in United States v. Caceres, 440 U.S. 741 (1979), United States v. White, 401 U.S. 745 (1971) and Lopez v. United States, 373 U.S. 427 (1963), stated:

> The Federal constitutionality of warrantless electronic surveillance with the consent of one party to a conversation has been upheld on the ground that when one speaks one voluntarily assumes not only the risk that one's listener may repeat what one says to others, but also the risk that the listener may be recording or monitoring the conversation for

> broadcast to others . . . . Under this 'assumption of the risk' analysis, no search or seizure covered by the Fourth Amendment is deemed to have occurred, and thus no warrant is required. Thorpe, supra at 256.

Indeed, the petitioner conceded the Fourth Amendment issue in the court below.

> Thorpe concedes on this appeal that the recording of his conversations with McCue's consent does not violate the Fourth Amendment to the United States Constitution. Thorpe, supra at 256.

III. NEITHER THE FEDERAL OR THE MASSACHUSETTS WIRETAP STATUTES REQUIRE THE EXHAUSTION OF NORMAL INVESTIGATIVE PROCEDURES PRIOR TO THE RECORDING OF A CONVERSATION WHEN ONE OF THE PARTIES TO THAT CONVERSATION HAS GIVEN PRIOR CONSENT.

Both the federal and Massachusetts wiretap statute only require the normal investigative procedures be exhausted before application is made for a court-sanctioned interception. That is,

when there is to be a recording of a conversation wherein neither party to that conversation has consented thereto.

The trial judge stated at (Thorpe's Petition, App. 39):

> There is no merit to defendant's 'exhaustion' argument, since that requirement relates only to the warrant procedure. See Commonwealth v. Vitello, supra at 259.

In dealing with this issue, the Supreme Judicial Court stated:

> Contrary to Thorpe's assertion, there is no requirement that 'normal investigative procedures' be shown to have failed before the §99 B.4. exception comes into play. Such a showing must be made only when a warrant is sought. Chapter 272, §99 E3 (requiring the applicant to demonstrate that 'normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried'). As the quoted language demonstrates, Thorpe is wrong in claiming that the State statute does not mention normal investigation proceedings except in the preamble. His preemption argument, which is based

on the claimed failure of the State to comply in this respect with 18 U.S.C. §2518(1)(c) (1976), therefore fails. Thorpe, supra at 256 n. 9.

Petitioner cites no authority to the contrary.

CONCLUSION

For the reasons set forth above the Respondent respectfully submits that the Petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

M.G.L., c. 272, §99:

Eavesdropping, Wire Tapping, and Other Interception of Communications.

B. Definitions. As used in this section --

4. The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication; provided that it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to

record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.